Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

TRANSMISSION AGENCY OF NORTHERN CALIFORNIA,

Petitioner,

v.

SIERRA PACIFIC POWER COMPANY, BONNEVILLE POWER ADMINISTRATION, PACIFICORP, and PORTLAND GENERAL ELECTRIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DENNIS L. VIGLIONE
MONTAGUE & VIGLIONE
Attorneys for Petitioner
1500 River Park Drive
Suite 110
Sacramento, CA 95815
(916) 929-5018

176424

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Does the United States Court of Appeals for the Ninth Circuit have original jurisdiction over breach of contract claims against the Bonneville Power Administration?

2. Does 16 U.S.C. § 839f(e)(5), which requires that challenges to the validity of a Bonneville Power Administration administrative action be brought within 90 days from the date of such action, also apply as a 90-day statute of limitation to breach of contract, tort or inverse condemnation claims which might later arise out of that action, but which if and when they do arise will not challenge the validity of that action?

3. Are claims for breach of contract, inverse condemnation and tort, which arise out of the operation of an electric transmission line regulated by the Federal Regulatory Commission ("FERC"), but which do not challenge the legality, validity or the propriety of the line, or seek to regulate the line, access to it, or rates for electrical power flowing on it, the exclusive province of FERC and therefore preempted?

4. Does the filed rate doctrine bar the recovery of damages calculated with reference to the filed rate actually in effect from the date damage is first claimed until the date of trial?

PARTIES TO THE PROCEEDING

Petitioner:

Petitioner Transmission Agency of Northern California is a governmental agency, specifically a joint exercise of powers agency organized and existing under the laws of the State of California. Petitioner's members are the California cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara (now Silicon Valley Power), and Ukiah; the Sacramento Municipal Utility District; the Modesto Irrigation District, and the Turlock Irrigation District. The Plumas-Sierra Rural Electric Cooperative is an associate member of petitioner. Among petitioner's purposes is the provision of electric transmission facilities and services for the use of its members.

Respondents:

Respondents are set forth in the caption.

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Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of California Dated February 8, 2001 And Filed February 9, 2001 ..... 28a

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit order amending and denying petition for rehearing and petition for rehearing en banc and amended opinion (App. A at 1a-27a) is reported at 295 F.3d 918. The District Court opinion (App. B at 28a-52a) is apparently unreported.

STATEMENT OF JURISDICTION

On July 8, 2002, the Ninth Circuit Court of Appeals entered its order amending opinion and denying petition for hearing and petition for rehearing en banc and amended opinion. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND JUDICIAL DOCTRINES INVOLVED

Federal statutes involved include the Federal Power Act, specifically 16 U.S.C. § 839f(e)(5) regarding judicial review of BPA administrative actions, and 28 U.S.C. § 1631 regarding transfers to cure want of jurisdiction. Also involved are the doctrines of federal preemption and the filed rate doctrine.

STATEMENT OF THE CASE

I. *Introduction*

In the Interim Interconnection Agreement and the Schedule and Coordination Agreement (the "Agreements") between the Transmission Agency of Northern California ("TANC") and the Bonneville Power Administration ("BPA"), PacifiCorp, and Portland General Electric Company ("Portland") (collectively the "Northwest Parties"), the parties agreed to design, build, operate and maintain an integrated electric transmission system capable of transferring 4800 megawatts ("MW") of power north to south across the California-Oregon border. The Northwest Parties promised to build and maintain their segment of this integrated system north of the California-Oregon border. TANC promised to build the California-Oregon Transmission Project (the "COTP") in California. When interconnected at the California-Oregon border, these two segments, together with two other transmission lines in California, would form a coordinated system having a north to south transfer capability of 4800 MW.

In reliance on the Northwest Parties' promises, TANC built the COTP.

For a time the Northwest Parties complied with the Agreements by building their portion of the integrated system north of the California-Oregon border and operating it in such a manner as to maintain the 4800 MW of transfer capability required under the Agreements. In 1998, however, the Northwest Parties breached the Agreements by failing to maintain 4800 MW of transfer capability. This failure resulted not from events beyond the Northwest Parties' control,

but from their voluntarily taking affirmative and deliberate steps to modify their portion of the integrated system so as to reduce the transfer capability of the integrated system to 4500 MW north to south at the California-Oregon border, while failing to upgrade their system or to take other measures to replace the 300 MW of capacity lost thereby. The modification consisted of interconnecting the Northwest Parties' portion of the integrated system north of the border with a new 300 MW capacity line (the "Alturas Intertie Project") built by Sierra Pacific Power Company ("Sierra Pacific") for delivery of power primarily into Nevada. This interconnection was not required by any statute, rule or regulation, or mandated by any governmental entity.

TANC therefore asserts a claim against the Northwest Parties for breach of the Agreements for their failure to maintain 4800 MW of transfer capacity.

TANC's claims against Sierra Pacific include claims for interference with the contractual relationship between TANC and the Northwest Parties and a claim for misrepresenting the purpose of the Alturas Intertie Project in order to obtain governmental permits and authorizations to construct and operate the Alturas Intertie Project.

TANC's inverse condemnation and other tort claims asserted against the Northwest Parties and BPA are for damage to and interference with the COTP and TANC's rights under the Agreements caused by operation of the Alturas Intertie Project. With respect to these claims, TANC is no different from any other owner of property or contract rights damaged or adversely affected by operation of the Alturas Intertie Project.

In this action TANC does not claim that the construction and operation of the Alturas Intertie Project were illegal or improper. Whether or not they were is not relevant to TANC's claims. This lawsuit does not involve issues regarding whether, how, when or under what constraints the Alturas Intertie Project should have been built or should be operated. For better or worse, the Alturas Intertie Project has been built and placed in operation.

TANC in this action does not challenge any order of the Federal Energy Regulatory Commission ("FERC"). It does not seek any ruling, judgment or order regarding or affecting the interconnection of transmission facilities, rates, terms or conditions of transmission services, the sale of power, or the design, operation, use or maintenance of the Alturas Intertie Project. It does not seek any relief which is the prerogative of FERC or any other agency. What TANC seeks is money damages, which FERC has no authority to award.

Apart from this action, none of TANC's causes of action has been determined by or even presented to any court or agency.

II. *Facts As Alleged*

In its first amended complaint TANC alleges as follows:

TANC is a joint exercise of powers agency organized and existing under the laws of the State of California. Among TANC's purposes is the provision of electric transmission facilities and services for the use of its members.

Sierra Pacific, PacifiCorp, and Portland are electric utilities. BPA is a federal power marketing administration that markets electric power from federal and non-federal hydroelectric projects.

TANC is a participant in, and the project manager of, the COTP, which is a 500 kV transmission project extending from the California-Oregon border to central California. TANC has invested over $400 million in the COTP which became operational in March 1993. The COTP, together with two other California transmission lines extending to the California-Oregon border and known as the Pacific AC Intertie ("PACI"), comprise the California-Oregon Intertie ("COI"). The Northwest Intertie consists of transmission facilities north of the California-Oregon border owned in part by the Northwest Parties, which interconnect to the COI at the California-Oregon border.

In 1991 TANC and the Northwest Parties entered into the Agreements, which, among other things, obligated the Northwest Parties to upgrade or reinforce the Northwest Intertie to accommodate and provide for 4800 MW of transfer capability north to south from the Northwest Intertie to the COI. The Northwest Parties did complete such upgrades and reinforcements, known as the Northwest Reinforcement Project, and the FERC adopted a final rating for the COI of 4800 MW north to south, and allocated 1/3 of this transfer capability to the COTP.

In the Agreements, the Northwest Parties represented, promised and agreed that they would: plan, design, cite, construct and operate transmission facilities north of the California-Oregon border capable of transferring 4800 MW of power to electric transmission lines in California, including 1600 MW of power to the COTP; construct, operate, and maintain transmission facilities north of the California-Oregon border so as to minimize the possibility and impact of a disturbance originating from said facilities which would reduce their operating transfer capabilities; and take those

measures required to maintain the capability to transfer 4800 MW of power from the Northwest Parties' transmission facilities north of the California-Oregon border to facilities south of the California-Oregon border of which the COTP is a part. In return, TANC represented, promised and agreed that it would construct the COTP with the capability to import 1600 MW of power, thereby increasing the capacity of transmission facilities south of the California-Oregon border to a matching 4800 MW north to south.

In the Agreements, the parties recited, represented and agreed that their plan and intent was to provide the facilities necessary to transfer 4800 MW at the California-Oregon border from the Northwest Parties' transmission facilities to transmission facilities south of the California-Oregon border including the COTP; that it was important that facilities north and south of the California-Oregon border be constructed and operated in a coordinated manner; and that the parties would construct, operate and maintain their facilities so as to maximize operating transfer capability to equal the greatest extent practicable the rated transfer capability of 4800 MW.

The Northwest Parties initially performed under the Agreements by designing, constructing and operating their facilities in such a manner that the Northwest Parties' facilities north of the California-Oregon border had the capability, absent events beyond their control, of exporting 4800 MW of power at the California-Oregon border as provided for in the Agreements. However, in December 1998 the Northwest Parties breached the Agreements, including their promise to maximize transfer capability to equal to the greatest extent practicable the rated transfer capability of 4800 MW, by failing to maintain 4800 MW of transfer capability between the Northwest Intertie and the COI.

At that time the Northwest Parties modified the Northwest Intertie in such a manner as to reduce the capacity of the integrated system at the California-Oregon to 4500 MW. This reduction resulted when the Northwest Parties allowed, agreed to and participated in the construction and operation of the Alturas Intertie Project.

The Alturas Intertie Project consists of an approximately 200-mile long, 345 kV transmission line which interconnects with the Northwest Intertie and extends across northeastern California terminating at Sierra Pacific's North Valley Road substation, north of Reno, Nevada. The majority of the Alturas Intertie Project transmission line is in California. The Alturas Intertie Project commenced operation on or about December 21, 1998, and has a rated transfer capability of 300 MW. Whenever power is transferred north to south to the Alturas Intertie Project, the capability of the Northwest Intertie to export power to California transmission facilities, including the COTP, is reduced on a MW for MW basis.[1]

TANC's first amended complaint alleges breach of the Agreements by the Northwest Parties, and interference by

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1. In footnote 6 of its Memorandum and Order, the District Court noted that

> the parties agree that when power is delivered from the Northwest Intertie to the Alturas Intertie, the amount of power that can be delivered to the [COI] is reduced by the amount delivered to the Alturas Intertie. Thus, if the Alturas Intertie is operated at its full transmission capacity of 300 MW, the [COI] can simultaneously receive only up to 4500 MW, 300 MW less than its 4800 MW transfer capability. App. B at 31a.

Sierra Pacific with the contractual relationship between TANC and the Northwest Parties and with TANC's prospective economic advantage.

In its claim for inverse condemnation against all defendants TANC alleges that the operation of the Alturas Intertie Project by the Northwest Parties and Sierra Pacific, each of which possesses the power of eminent domain, interferes with TANC's use and operation of the COTP, causes the loss of the transmission capacity and capability over the COTP specified in the Agreements, and exceeds the use which was represented to the California Public Utilities Commission in order to obtain a certificate of public convenience and necessity to construct and operate the Alturas Intertie Project.

In its cause of action for trespass against all defendants TANC alleges that the Alturas Intertie Project causes a measurable invasion and intrusion of current and flow onto the COTP.

In its cause of action for private nuisance against all defendants TANC alleges that the Alturas Intertie Project interferes with TANC's use and beneficial enjoyment of the COTP, such interference having occurred as a result of the physical invasion onto the COTP of electrical current and the reduction of capacity of the COTP.

In its cause of action for conversion against all defendants TANC alleges that by operation of the Alturas Intertie Project the Northwest Parties and BPA have converted the COTP and the capacity for which it was designed for their own use.

In its cause of action for intentional misrepresentation by Sierra Pacific, TANC alleges that Sierra Pacific obtained governmental permits and authorizations to construct and operate the Alturas Intertie Project by representing to governmental agencies and interested parties, including TANC, that the purpose of the Alturas Intertie Project was to provide emergency support to Sierra Pacific and to enable Sierra Pacific to make occasional economy purchases and sales, but not to purchase power to increase capacity. TANC further alleges that such representations were false in that the true purpose of the Alturas Intertie Project has always been, and is, to enable Sierra Pacific to make firm power purchases in order to increase its power capacity.

III. *The Proceedings In The District Court*

On February 5, 2001, respondents' motions to dismiss were heard by the Honorable William B. Shubb, United States District Judge. On February 9, 2001, the District Court entered its memorandum and order granting the respondents' motions to dismiss, thereby dismissing all of TANC's claims against all respondents. On February 9, 2001, judgment was entered in accordance with the District Court's order. On March 5, 2001, TANC filed its notice of appeal with the Ninth Circuit.

In dismissing TANC's claims against BPA, the District Court concluded that it was without jurisdiction to hear TANC's claim against BPA for breach of contract. The District Court concluded that TANC's breach of contract claims against BPA challenged agency action by BPA, and that therefore the Ninth Circuit Court of Appeals has exclusive jurisdiction over such claims. The District Court failed to address, apparently through inadvertence, TANC's inverse condemnation claim

against BPA, but dismissed it nonetheless. In dismissing TANC's claims against the remaining defendants, the Court ruled that all of TANC's claims are preempted by the Federal Power Act and the regulations issued pursuant to the Act by FERC.

IV. *The Proceedings In The Ninth Circuit Court Of Appeals*

The Ninth Circuit Court of Appeals affirmed the District Court's judgment. The Ninth Circuit filed its initial opinion on April 16, 2002. TANC timely petitioned for rehearing by the panel and for rehearing en banc. On July 8, 2002, the Ninth Circuit filed its order amending opinion and denying petition for rehearing and petition for rehearing en banc and its amended opinion.

The Ninth Circuit held: (1) that it has jurisdiction over TANC's breach of contract claims against BPA; (2) that transfer to another court would be futile because TANC's breach of contract claims against BPA were barred as of 90 days after BPA decided to interconnect with the Alturas line — despite the fact that BPA's decision to interconnect was made years *before* BPA breached its Agreements with TANC; (3) that all of TANC's claims are preempted simply because they arise out of the operation of an electric transmission line regulated by FERC; and (4) that the filed-rate doctrine bars recovery of damages because an award of such damages would necessarily involve speculation that FERC, but for the interconnection with the Alturas line, would have continued to allow a rating of 4800 MW on the parties' integrated system.

REASONS FOR GRANTING THE PETITION

I. *Introduction*

First, the Ninth Circuit held that it, and not the District Court or the Court Of Federal Claims, has jurisdiction over what is a pure and unadulterated breach of contract claim against BPA. This holding is unprecedented, is contrary to federal statute, and is in direct and complete conflict with the Ninth Circuit's own holding in *Public Utility District Number 1 v. Johnson*, 855 F.2d 647 (9th Cir. 1988).

Second, the Ninth Circuit held th 16 U.S.C. § 839f(e)(5) operates as a 90-day statute of limitation, barring breach of contract and inverse condemnation claims against BPA years before the breach occurs, or the offending project giving rise to the inverse claim is even built. If this ruling stands, any party with a contract with BPA will be compelled to file a preemptive lawsuit within 90 days after BPA makes an administrative decision to take action which might, years later, give rise to a breach of that contract. This would be the case even when the BPA action would not itself constitute a breach of the contract. Likewise, the owner of property which might be adversely affected by a project which BPA decides to undertake would be compelled to file an inverse condemnation action years before the potentially offensive project is even built. Further, these preemptive lawsuits would be required even if there is no claim that the action undertaken by BPA is invalid, illegal or improper. No court has ever applied this statute in such a manner.

Third, the Ninth Circuit held, with no citation to any supporting authority, that "TANC cannot obtain state law money damages allegedly resulting from the operation of an

interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval." App. at 15a. No court has ever applied the preemption doctrine in such a manner in the context of the transmission of electricity or of any other federally regulated industry.

To put this ruling in a more familiar context, this would be akin to ruling that an owner of property cannot obtain compensation for impairment resulting from the operation of an aircraft in a manner expressly approved by the FAA. All flight operations are expressly approved by the FAA, and the proposed manner of operation is not only contemplated, but studied extensively. Yet in thousands of instances, property owners have recovered damages under inverse condemnation and nuisance theories when airplanes fly overhead, albeit in perfect compliance with all FAA regulations.

Fourth, regarding the filed rate doctrine, the Ninth Circuit states that state law "may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." App. at 17a. Some courts have extended the filed rate doctrine so as to preclude recovery of damages calculated by reference to a rate which an agency might have, or should have, or would have approved, but did not. However, no court has ever remotely held, as the Ninth Circuit does here, that the filed rate doctrine precludes recovery of damages calculated by reference to an existing rate because the existing rate is subject to change, and therefore it is speculative to assume an agency would not change its rates. Further, even if the filed rate doctrine were stretched to so provide, even such an extreme application of the doctrine would not apply to

damages incurred prior to the date of trial. Those damages can be calculated by reference to the rate or rates actually in effect up to that point in time. Those rates are known as a matter of historical fact — no speculation or assumption is necessary.

The above holdings are literally unprecedented, and in each case diverge widely from, and conflict with, the many opinions which have issued on each of the above four questions. Further, all four matters are questions of exceptional importance on a national level, affecting not only the electric transmission industry, but all federally regulated commerce.

TANC, while respectful of the Ninth Circuit, believes that review of the above holdings is not only appropriate, but critically necessary. All four rulings are unprecedented and incorrect. Three are illogical. Two are contrary to statute. Two are directly contrary to decisions in other circuits. One is directly contrary to established case law in the Ninth Circuit itself. Two constitute substantial and unwarranted expansions of doctrines, the bounds of which have been well and carefully established through a multitude of cases in this Court and the various circuits. And one will cause the filing of likely hundreds of preventative, protective, premature and unnecessary lawsuits by wary parties in contract with BPA.

II. *Argument*

A. Contrary To Law Well Established By Statute And The Ninth Circuit Itself, And In Particular To *Public Utility District Number 1 v. Johnson*, 855 F.2d 647 (9th Cir. 1988), The Ninth Circuit Has Ruled That It Has Original Jurisdiction Over A Breach Of Contract Claim Against BPA.

Taking TANC's allegations as true, the Ninth Circuit acknowledges that "[u]nder the Agreements [sued upon by TANC], the Northwest Parties agreed to upgrade from 3200 MW to 4800 MW an existing intertie that they own in Oregon, known as the Northwest AC Intertie", and that for a time "[t]he parties performed under the Agreements . . . ". App. at 3a-4a. TANC claims that the Northwest Parties, including BPA, breached the Agreements by failing to maintain 4800 MW of capacity at the California-Oregon border, even though no federal agency took any actions, directly or indirectly, which compelled a reduction. This is as pure and unadulterated a breach of contract claim as can be imagined. Under *Public Utility District Number 1 v. Johnson*, 855 F.2d 647 (9th Cir. 1988) such a breach of contract claim is not a challenge to a final action or decision of BPA, and therefore the Ninth Circuit does not have original jurisdiction of such a claim. The Ninth Circuit's ruling is in direct conflict with its holding in *Public Utility District Number 1*.

The Ninth Circuit does have original jurisdiction over "[s]uits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by [BPA] . . ." 16 U.S.C. § 839f(e)(5). TANC has repeatedly stipulated that in this action it does not

challenge any action or decision by BPA. TANC does not claim that any action by BPA, including its participation in the Alturas Intertie Project, was unconstitutional, illegal, improper, unauthorized or unwise. Whether BPA's action was any of the above has no bearing whatsoever on the validity of TANC's breach of contract claims against BPA. Nor does TANC claim that BPA's decision to participate in the Alturas Intertie Project or its actual participation constitutes a breach of the Agreements. The Agreements do not prohibit or preclude such an intertie. The Ninth Circuit has exercised what Congress has not given it: jurisdiction over breach of contract claims against BPA.

The Ninth Circuit in *Public Utility District Number 1* held that a breach of contract claim such as TANC's is not a challenge to final actions or decisions of BPA. The Ninth Circuit's present decision is directly contrary to that holding.

The cases cited by the Ninth Circuit provide no precedents for its holding. In *Pacific Power and Light Company v. Bonneville Power Administration*, 795 F.2d 810 (9th Cir. 1986) the agreements at issue restricted the manner in which BPA could change the methodology for calculating average cost, a BPA rate-making activity authorized by, and indeed required by, federal statute, and subject to FERC review and approval. In this case, the Agreements do not restrict in any way whatsoever the manner in which BPA conducts activities which it is required or authorized by law to undertake. They do not prohibit BPA from participating in the Alturas Intertie Project, and they nowhere restrict interconnection with that project or any other system.

In *Central Montana Electric Power Co-op, Inc. v. BPA*, 840 F.2d 1472 (9th Cir. 1988), as the Ninth Circuit notes at App. at 10a, "the nature of the agency action being challenged by the Cooperatives [was] the Administrator's final action as to the marketing and allocation of electric power, a function that is governed extensively by the Northwest Power Planning Act. . . . Accordingly, the action is subject to our exclusive jurisdiction. . . . " TANC does not challenge BPA's marketing, allocation, rates, or any other action by BPA, including its participation in the Alturas Intertie Project. Indeed, in *Central Montana*, plaintiffs sought "a declaration holding that the electric power produced by the Libby project is reserved by statute primarily for use in the state of Montana." *Id.* at 1474. The court stated "[a]fter examining the relevant statutes and legislative history, we conclude that Congress has not established a Montana preference for Libby power." *Id.* at 1477. *Central Montana* was not a breach of contract case or even an ersatz breach of contract case. It was a declaratory relief action in which a declaration was sought regarding a claimed statutory right, not a private contract right.

B. In A Ruling Which Is Unprecedented, Incorrect, And Contrary To Statue, And Which Will Likely Spawn A Substantial Number Of Unnecessary Federal Lawsuits, The Ninth Circuit Has Transformed 16 U.S.C. § 839f(e)(5) From A Statute Of Limitation Governing Challenges To The Validity Of BPA Actions To A 90-Day Statute Of Limitation Governing All Claims Which Might Later Arise Even Indirectly Out Of That Action.

TANC asserts that BPA's failure to maintain 4800 MW of transfer capacity at the California-Oregon border constitutes a breach of the Agreements. TANC further asserts an inverse condemnation claim against BPA arising out of interference and loss of capacity caused by operation of the Alturas Intertie Project, a project in which BPA is a participant. The breach and interference first occurred in December 1998 when the Alturas Intertie Project became operational. TANC filed this action in December 1999.

In declining to transfer under 28 U.S.C. § 1631 TANC's claims against BPA, the Ninth Circuit held that TANC's claims were time barred by the 90-day limitation period in 16 U.S.C. § 839f(e)(5). App. at 13a. That section provides:

> Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by [BPA], or the implementation of such final actions, whether brought pursuant to this chapter, the BPA Project Act [16 U.S.C.A. § 832 *et seq.*], the Act of August 31, 1964 (16 U.S.C. §§ 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. § 838 and following), shall be filed

> in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred. . . . Suits challenging any other actions under this chapter shall be filed in the appropriate court.

The Ninth Circuit's construction of this statute is not only incorrect and unprecedented, but will almost certainly compel the filing of a substantial number of otherwise unnecessary lawsuits.

The holding is incorrect because the statute expressly applies to *challenges* to the constitutionality, legality and validity of BPA administrative actions. If such challenges are not made within 90 days, they are barred, and thereafter only actions which do not seek to invalidate, prohibit, limit or otherwise challenge actions or decisions of BPA may be brought.

However, the Ninth Circuit's holding is tantamount to ruling that if BPA makes an administrative decision to take an action which does not constitute a breach of contract between BPA and a third party, but *might* under certain circumstances cause a breach to occur years later, the third party must file a lawsuit in the Ninth Circuit within 90 days of BPA's administrative decision. Thus, the third party must file a "protective" or "preemptive" lawsuit potentially years before a breach occurs, if it ever does, rather than within four years thereafter. This is so even if the third party has no belief and makes no claim that BPA's action was illegal, improper, invalid, or wrong.

Also, the Ninth Circuit fails to explain how TANC has lost its inverse claim against BPA. Has the Ninth Circuit ruled that TANC must bring a claim for inverse condemnation years before the offending project is built? Most projects which give rise to inverse claims are perfectly legal and there is no basis or reason to file "preemptive" lawsuits challenging the administrative decisions to build them. Must a third party within 90 days file a lawsuit in the Ninth Circuit challenging a BPA administrative decision which if and when implemented might give rise to an inverse claim against BPA?

As far as TANC is aware, no court anywhere has ever applied this 90-day limitation period to breach of contract or inverse claims, and for good reason. Not only does such a ruling extend this statute far beyond its clear meaning, but it would encourage, and even compel, the filing of lawsuits the majority of which would never be filed but for this ruling.

C. In A Ruling That Is Unprecedented And Contrary To Well Established Case Law, The Ninth Circuit Has Applied The Preemption Doctrine To Bar Claims For Loss And Damage Caused By A Transmission Line Simply Because The Line Was Approved By FERC.

The Ninth Circuit, citing no supporting authority, states "TANC cannot obtain state law money damages allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval". This could not possibly be the law. The Ninth Circuit dismisses TANC's analogy to property owners who oppose an airport project and then seek to recover for interference caused by the project after it is built over their opposition. The Ninth

Circuit explains that "TANC is not a homeowner. It is an operator of an interconnected, federally regulated, interstate transmission system." App. at 16a. However, the Ninth Circuit does not explain why this matters. Is the Ninth Circuit saying that TANC is fair game, wholly without judicial redress, regardless of how severely its facilities are damaged by operation of the Alturas Intertie Project? If the Alturas line experienced a massive malfunction and destroyed or severely damaged TANC's lines, facilities, or buildings, would TANC have no ability to recover its damages in a court of law under any legal theory? No court has ever so held or intimated. Indeed, such a result would violate TANC's rights under the Fifth Amendment of the United States Constitution. Would FERC hold a trial and determine and award money damages in that situation? If not FERC, who?

The Ninth Circuit offered its own analogy:

> Offering an analogy of our own, allowing TANC to sue under state law for damage allegedly caused to its transmission system by an interconnected interstate system approved by FERC would be akin to allowing an airline to sue under state law for economic damages caused by another airline's FAA-approved flight plans.

Why can't the affected airline sue? The Ninth Circuit cites no authority which says it can't. The Ninth Circuit cites no authority at all for the above proposition. If the FAA approves changes in airline A's flight plans and as a result airline B's use of its hangar is restricted, or its proposed use of its airport property is restricted due to newly imposed building height restrictions, or the walls of its airport offices shake when airline A's planes fly overhead, why can't airline B, just like

any other property owner, seek monetary compensation? The Ninth Circuit cites no authority precluding such an action. Would the FAA hold a trial and determine and award just compensation? Does not the Fifth Amendment guarantee airline B's right to compensation?

D. Departing Substantially From Well Established Precedent, And Without Justification, The Ninth Circuit Has Broadened The Scope Of The Filed Rate Doctrine Far Beyond That Defined By A Substantial Body Of Case Law.

The Ninth Circuit concludes that TANC's contract related claims against the "utility defendants" are barred by the filed rate doctrine:

> All of TANC's contract-related claims depend upon the assumption that, but for the misdeeds of the utility company defendants, FERC would have continued to allocate 4800 MW of electricity capacity from the Northwest AC Intertie to the California-Oregon Intertie. This speculative assumption as to how FERC would have allocated electricity transmission capacity runs afoul of the filed rate doctrine.

App. at 17a.

The Ninth Circuit describes the filed rate doctrine as follows: "At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." App. at 17a.

Some cases have held that the filed rate doctrine precludes a claim for damages measured by reference to a rate other than the rate actually adopted by the federal agency in question — in other words, by reference to a rate the agency could have/would have/should have adopted, but did not. The Ninth Circuit at App. at 17a-18a says that the filed rate doctrine will not allow a plaintiff "to assume a rate would be charged other than the rate adopted by the federal agency in question" (does this not imply that a plaintiff may assume that a rate would be charged that *is* the rate adopted by the federal agency?); that "the Supreme Court [has] held that a plaintiff in a case involving electricity rates set by the Federal Power Commission (the precursor to FERC) could claim no rate as a legal right that is other than the filed rate . . . " (does this not imply that a plaintiff could claim as a legal right the rate that *is* the filed rate?); and that "the filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC" (does this not imply that a court could utilize a rate that is *not* different from that actually set by FERC?).

Here the "rate" actually approved by FERC is, and at all times since activation of the Alturas Intertie Project has been, 4800 MW. There is no need to speculate as to what "rate" FERC or anyone else could have/would have/should have approved. TANC's damages are measured by the shortfall between actual capacity as reduced by the effects of the Alturas line, and 4800 MW of capacity approved by FERC. TANC's damages can be determined with reference to the capacity rating of 4800 MW actually approved by FERC, not a hypothetical rate "different from" or "other than" this rating.

The Ninth Circuit, however, concluded that the filed rate doctrine bars TANC's claims because those claims depend on the speculation and assumption that "FERC would have continued to allocate 4800 MW of electricity transmission capacity from the Northwest AC intertie to the California-Oregon intertie." App. at 17a. While some cases have held that the filed rate doctrine precludes an award of damages based on speculation as to what rates an agency might have set, but did not, *no case has ever remotely held that the filed rate doctrine precludes the recovery of damages based on "speculation" that the agency would not change rates it has set.* Even the respondents, who have raised every defense imaginable, have not made this argument. This is a substantial and illogical expansion of the filed rate doctrine. One need not assume or hypothesize a 4800 MW transfer rating. To this day the interconnection *has* been rated at 4800 MW.

Even the filed rate doctrine as expanded by the Ninth Circuit would not apply to the period from the day the Alturas Intertie Project became operational to the day of trial. There is no need whatsoever to speculate or assume regarding the rated capacity during this period. It will be what it was. TANC's damages during this period in no way whatsoever will depend on speculation or assumption. They will depend on the actual rating during this period — something which will be known as an absolute, historical *fact*.

The Ninth Circuit says that "TANC cannot prove damages without assuming that FERC would have allocated 4800 MW to the California-Oregon Intertie". App. at 24a. This is simply not true. *At the time of trial both rated capacity and actual capacity from the time the AIP became operational until the time of trial will be known.* At a minimum, damages

suffered up to the date of trial can be determined by reference to the difference between those two known quantities. No speculation or assumption will be necessary.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DENNIS L. VIGLIONE
MONTAGUE & VIGLIONE
Attorneys for Petitioner
1500 River Park Drive
Suite 110
Sacramento, CA 95815
(916) 929-5018